

MORGAPPA v. CASIE CHETTY.

353—C. R. Colombo, 24,309.

A. St. V. Jayewardene, for appellant.

Bawa, K.C., for respondent.

November 6, 1913. ENNIS J.—

The principles governing in Ceylon the acquisition of rights of way by prescription have been laid down in the cases *Karunaratne v. Gabriel Appuhamy* (15 N. L. R. 257), *Andris v. Manuel* (2 S. C. D. 69), and *Kandaiah v. Seenitamby*.² The track over which the right is acquired must be strictly defined, and one track cannot be substituted for another without a notarially executed document or user of the new track for the full prescriptive period. *Costa v. Livera* (16 N. L. R. 26) can be distinguished, because in that case the existence of a right of way was admitted.

In this case the plaintiff claimed by prescription a right of way for himself, his servant, and others to and from his house and the Santiago road over the plot of land belonging to the defendant, and the case went to trial on the following issues:—

- (1) Is plaintiff by long possession and prescriptive right entitled to a right of way from house No. 94 over the defendant's premises No. 88 to Santiago road?
- (2) If so, is the plaintiff entitled to the passage from A to B as shown on the plan?
- (3) If plaintiff has acquired such a right over the route A B, has she lost the same by abandonment or release?

The learned Commissioner of Requests found the following facts:—“For the last seventy years the occupants of No. 94 used to go to the Santiago road, on the west of No. 88, by walking across the defendant's land. For years the defendant's land lay there as a bare land with three huts on it, and across this

¹ S. C. Min., June 26, 1909.

² (1913) 17 N. L. R. 29.

1913.

people went to and from No. 94 by the shortest route. The defendant did now and again patch up that apology for a fence which ran by the side of the Santiago road, but in that fence there were perforce openings. The track which the occupants of No. 94 used was only approximately the line A B, and probably ran a little to the north of it in consequence of the hut standing at the point B."

In 1905 defendant erected a bamboo fence along A C, blocking the original passage, and plaintiff's people then used the passage A C. Later the defendant blocked A C, and plaintiff's people then used the track A D.

The prescriptive period for the acquisition of a right of way along A C or A D has not expired, and no right of way along those lines has been acquired.

With regard to the right claimed along A B, the plan filed with the plaint is not a survey plan. It does not agree with the survey town plan out in by the defendant. The line A B on the plan is, therefore, not clearly defined on the plan. The evidence has proved without doubt a gap (A) in the boundary wall between the premises of the plaintiff and defendant, but the other end of the track is not certain. It would seem that at times the servants' entrance to No. 88 was used, and that at other times gaps (more than one) in the fence along the Santiago road were used.

The evidence seems to me to make it perfectly clear that after passing the point A people passed over the defendant's land to any opening on the Santiago road at the time available; there was no clearly defined terminus on the Santiago road, and there was no clearly defined track between two points; it was a bare land, over which people passed in any direction as convenience and the state of the fence required. In these circumstances, no right of way by prescription could be acquired. To establish a right of way by prescription it is not sufficient to show that people passed over the land, it must be proved that they used a clearly defined track for the full prescriptive period.

I allow the appeal, and direct that the action be dismissed with costs.

Appeal allowed.

